

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

NICHOLAS ELY,

Petitioner,

vs.

SCOTT R. FRAKES, Director of the
Nebraska Department of Correctional
Services; and TODD WASMER, Warden
Tecumseh Correctional Institution;

Respondents.

8:21CV95

MEMORANDUM AND ORDER

This matter is before the Court for initial review of Nicholas Ely's Petition for a Writ of Habeas Corpus ("petition") under [28 U.S.C. § 2254](#) ([Filing No. 1](#)). Under § 2254, a district court is authorized to "entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Rule 4 of the Rules Governing § 2254 Cases requires the Court to conduct an initial review of the petition and to summarily dismiss the petition "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief." *Id.* If the Court does not summarily dismiss the petition, it "must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the [Court] may order." *Id.*

Ely was convicted by jury trial of first-degree felony murder and use of a firearm to commit a felony in October 2012. [Filing No. 1 at 1](#) and 6. Ely was then sentenced to life imprisonment for first-degree felony murder and five years of imprisonment for use of a weapon to commit a felony, to run consecutively. *Id.* at 7. Ely's conviction was later

affirmed by the Supreme Court of Nebraska in early 2014. *Id.* at 1. *State v. Ely*, 287 Neb. 147, 841 N.W.2d 216 (2014). Ely made post-conviction motions¹ to the Supreme Court of Nebraska which were all denied. *Filing No. 1 at 20*. In his Writ of Habeas Corpus Ely alleges that his requests to represent himself due to dissatisfaction with appointed counsel in trial were not permitted and thus violated his constitutional rights.

The Court has initially reviewed Ely's petition and supporting documentation and finds that summary dismissal is not warranted at this time. Accordingly,

THEREFORE, IT IS ORDERED:

1. The Clerk of Court shall serve copies of this order and the petition to the respondents and the Nebraska Attorney General.
2. The respondents shall file an answer in accordance with Rule 5 of the Rules Governing Section 2254 Cases, or other response within 21 days of the date of this order.
3. The petitioner shall file any reply within fourteen days of the filing of the respondents' answer or response.

Dated this 24th day of August, 2022.

BY THE COURT:

s/ Joseph F. Bataillon
Senior United States District Judge

¹ See *Filing No. 1 at 19–20* for detailed timeline of Petitioner's post-conviction actions. After the Nebraska Supreme Court affirmed his conviction and sentences, Petitioner filed a timely pro-se Motion for post-conviction relief on July 31, 2014. This motion was denied without an evidentiary hearing and Petitioner timely filed an appeal. On July 13, 2020, the Nebraska Supreme Court affirmed the denial of post-conviction relief. One week later, Petitioner filed a timely motion for rehearing with the Nebraska Supreme Court on July 20, 2020, with an accompanying brief filed September 3, 2020. Ely's final motion for rehearing was denied on November 4, 2020.